

April 22, 2005

FEDERAL EXPRESS

Robert W. Ritchie, Esquire
Office of the Attorney General
Western Massachusetts Division
1350 Main Street
Springfield, MA 01103-1629

RE: Town of Acton
Article 25B – Construction of Antenna Support Structures
Annual Town Meeting of April 5, 2005

Dear Mr. Ritchie:

I am responding to an undated letter to your office, stamped received on April 14, 2005, from Christopher J. Whitley concerning Article 25B as adopted at Acton's 2005 Annual Town Meeting concerning Construction of Antenna Support Structures. Mr. Whitley's letter also enclosed copies of his letters to your office dated March 20, 2005, and to the Town Manager dated March 15, 2005.

To put this matter into context, I have also enclosed copies of the following documents:

1. Affidavit of Eva Bowen dated April 12, 2005 (Exhibit 1); and
2. Affidavit of Roland Bartl dated March 16, 2005 (Exhibit 2).

Based on the following information, the Town respectfully requests that the Attorney General's Office approve Article 25B.

History of the Town's Adoption of Article 25B.

- **Mr. Whitley's Court Complaint**

In December 2004, Mr. Whitley filed in Superior Court an appeal from a decision of the Acton Zoning Board of Appeals denying a variance to exceed applicable height limit under the Acton Zoning Bylaw to construct a 62-foot amateur radio tower and antenna structure on Whitley's property at 20 Silver Hill Road, Acton. The Complaint also challenged the validity of the Zoning Bylaw regarding amateur radio communication facilities then in effect.

At the time Mr. Whitley filed his Complaint, Section 3.10.3 of the Acton Zoning Bylaw (as approved by the Attorney General on July 29, 1997, copy enclosed as Exhibit 3) contained the following provision (emphasis added):

This section 3.10 shall apply only to reception and transmission facilities for the purpose of personal wireless communication services identified in the Federal Telecommunications Act of 1996. Nothing in this Bylaw shall be construed to regulate or prohibit customary installations for the reception of wireless communication signals at home or business locations, and nothing in this Bylaw shall be construed to regulate or prohibit an antenna installed solely for use by a federally licensed amateur radio operator, provided that the height of such antenna does not exceed applicable height limitations and, if freestanding, that it is set back from all LOT lines at least the distance equal to its height, but not less than the otherwise applicable minimum yard requirement.

At the time, the Bylaw's height limit prohibited any structure in excess of 36 feet in Mr. Whitley's zoning district, the R-4 zone. See, Zoning Bylaw, § 5.2.

- **The 2005 Zoning Amendments**

When Mr. Whitley's Complaint came to the attention of Town Counsel and the Board of Selectmen, the Town took immediate steps to propose and adopt revisions to its Zoning Bylaw to significantly liberalize the Bylaw's provisions applicable to amateur radio towers. The procedures followed by the Town in this regard are spelled out in detail in the Affidavits of the Town Planner Roland Bartl and the Town Clerk Eva Bowen. In summary:

1. The Town Manager on behalf of the Board of Selectmen instructed the Town Planner to conduct research with respect to the preparation and presentation at the April 2005 Annual Town Meeting of a revised zoning bylaw specifically applicable to amateur radio towers which (a) reasonably regulated the location and height of such antenna structures for the purposes of health, safety, or aesthetics, (b) reasonably allowed for sufficient height of such antenna structures so as to effectively accommodate amateur radio communications by federally

licensed amateur radio operators and (c) represented the minimum practicable regulation necessary to accomplish the legitimate purposes of the town enacting such bylaw. See the Federal Communications Commission declaratory ruling, known as "PRB-1," codified at 47 CFR §97.15(e), and G.L. c. 40A, § 3. (Bartl Aff. Para. 4).

2. After reviewing a number of different bylaws and ordinances on the subject, after receiving initial comments from a number of active amateur radio operators in Acton, and after receiving input from the Planning Board's Vice Chair who is himself a licensed amateur radio operator, the Planning Board prepared an initial public hearing draft of a proposed zoning amendment. (Bartl Aff. Para. 5 and Exhibit A).
3. This initial draft proposed a height limit of 80 feet, a limit of one tower per lot, and various other dimensional restrictions and controls. (Bartl Aff. Para. 5).
4. At the recommendation of Town Counsel, a variant of this draft was prepared to allow further relaxation of the height, setback and other provisions by special permit. (Bartl Aff. Para. 5 and Exhibit B).
5. Following the statutory requirements of G.L. c. 40A, § 5, the Planning Board issued a Notice of a public hearing to be held on February 22, 2005, concerning the proposed zoning changes for amateur radio towers. (Bartl Aff. Para. 6 and Exhibits C and D.)
6. The Planning Board conducted its public hearing on February 22, 2005. Numerous members of the public – including Mr. Whitley - attended the public hearing and spoke on the proposed zoning amendments for amateur radio towers. (Bartl Aff. Para. 7 and Exhibit E).
7. After the close of the public hearing on February 22, the Planning Board voted to propose to Town Meeting a draft zoning amendment containing essentially no height restriction and very few other requirements or restrictions on amateur radio towers. (Bartl Aff. Para. 8 and Exhibit F). The revised article would establish an amateur radio installation as a stand-alone principal use; retain the prohibition from the front yard of buildings; and retain the minimum standard setback requirements for structures.
8. After reviewing this draft and further meeting with representatives of the amateur radio community and the Board of Selectmen, the Planning Board made certain other minor adjustments to its proposed zoning article for amateur radio towers. (Bartl Aff. Para.9).
9. The Board of Selectmen (which had initiated the process for the zoning change in the first instance, which has the statutory authority to determine what articles are

placed on the Warrant for the Annual Town Meeting, and which has the statutory authority under M.G.L. c. 40A, § 5, to initiate zoning changes), determined to place two alternative articles on the Warrant regarding amateur radio towers. (Bartl Aff. Para.10).

10. The first such article was the final version of the Planning Board's draft proposed amendment, which appeared as Article 25A on the Warrant. (Bartl Aff. Para.9).
11. The alternate version, Article 25B, was based directly on the initial public hearing draft (Exhibit A), with the added special permit provision (Exhibit B), and was relaxed in specific and material ways in response to comments by the amateur radio community at the Planning Board's public hearing. For instance, Article 25B increased the "by right" tower height from 80' to 100'; allowed more than one tower on a lot by right in certain cases; allowed additional unlimited deviations from the bylaw's height and location requirements by special permit; and included specific instructions to the Board of Appeals in acting on special permit applications to apply the bylaw in a manner that conforms to federal law and M.G.L. c. 40A, § 3. (Bartl Aff. Para.10 and Exhibit H).
12. As the Planning Board Minutes of the 2/22/05 Public Hearing reflect (copy enclosed as Exhibit 4), the special permit provision was specifically addressed at the Planning Board's public hearing (ellipsis omitted; emphasis added):

Citizen Comments

Mr. Tom Hotaling, 12 Tuttle Drive, said it would concern him if towers had to be approved through a special permit process because it opens up the proposed tower to more scrutiny.

Planning Board comments

Ms. Rosenzweig said that in areas with small lots, like in West Acton, an amateur radio tower might have an impact on the neighbors. She expressed her comfort with the proposed height limit and would add a special permit for special cases, so that the warrant article balances law with neighborhood protection. Ms. Rosenzweig said the Town should take into consideration health, safety, and aesthetics when reviewing proposed towers to help protect townspeople.

13. The additional liberalizing amendments to the original public hearing draft were also directly responsive to comments made by official representatives of the amateur radio community. For example, the Volunteer Counsel for the Amateur Radio League specifically emailed Town officials (with a copy to Mr. Whitley) recommending that the initial public hearing draft be modified as follows (emphasis added):

-----Original Message-----

From: Fred Hopengarten [mailto:k1vr@juno.com]
Sent: Monday, February 21, 2005 6:18 PM
To: Board of Selectmen
Cc: whitleycj@comcast.net; kaw@hanify.com; renesq@comcast.net;
k1twf@arrl.org
Subject: Proposed Amateur Radio Bylaw

Dear Mr. Selectman:

I write to you as a Volunteer Counsel of the American Radio
Relay League, the national association for amateur radio.

.....

First, I urge the Planning Board and the Selectmen to consider
modifications to the bylaw. Examples:

* The 80 foot height limit is a reasonable height limit
for the grant of a permit by right. Actually, 90-100 feet, in order to
assure that antennas can be just a little bit higher than (and not
blocked by) 80-90 foot white pine trees would be better. However, after
that, greater height should be available by special permit, especially
if a party lives on a large lot, there is natural screening, and so
forth.

....

14. The final version of Article 25B contained the special permit provision discussed at the public hearing and additional liberalizing provisions directly responsive to these comments. (Bartl Aff. Exhibit H).
15. The Annual Town Meeting began on April 4, 2005, and concluded on April 5, 2005. Articles 25A and 25B were considered on April 5, 2005.
16. Town Meeting first debated and voted on Article 25A. It required a 2/3 vote to pass; however, it failed to achieve a 2/3 vote. (Bowen Aff. Para. 5).
17. The Planning Board then recommended passage of Article 25B. (Bowen Aff. Para. 6).
18. Town Meeting debated and voted on Article 25B. Based on a standing vote count, Article 25B was adopted by more than a 2/3 vote. (Bowen Aff. Para. 7).

Substantive and Procedural Validity of Article 25B

Immediately upon the adoption of Article 25B, the Town invited Mr. Whitley to apply for a building permit for his proposed 62 foot tower which is well within the 100' height limit allowed as of right under Article 25B. To date, Mr. Whitley has failed to apply for a building permit and appears more interested in pressing substantive and procedural challenges in Court and before your office. Ironically, these efforts attack the validity of the Town's effort to cure apparent problems with respect to a pre-existing bylaw provision, previously approved by your office, governing amateur radio towers.

For the reasons set forth below, the Attorney General should decline Mr. Whitley's efforts to undermine the Town's commendable efforts in this regard.

- **Substantive Validity**

As you know, G.L. c. 40A, § 3 provides as follows (emphasis added):

Zoning ordinances and by-laws may reasonably regulate the location and height of such antenna structures for the purposes of health, safety and aesthetics; provided however that such ordinances and bylaws reasonably allow for sufficient height of such antenna structures so as to effectively accommodate amateur radio communications... and constitute the minimum practicable regulation necessary to accomplish the legitimate purposes of the city or town...

Also as you know, FCC Regulations, 47 CFR 97.15, provide as follows (emphasis added):

Local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.

Article 25B conforms to these requirements of federal and state law as follows:

1. **By Right Provisions**

Article 25B allows **by right** one (or in certain circumstances two) Amateur Radio Tower(s) owned and operated by an amateur radio operator who is licensed by the Federal Communications Commission (FCC),

- in any Zoning District,
- with a height up to 100 feet from ground level,
- in any side and rear yard,

- set back (in a residential district) at least 30 feet from the side and rear LOT lines (with certain exceptions), and
- within a fence equipped with a locked gate (unless the tower is equipped with an effective anti-climb device).

2. Special Permit Provisions

Article 25B further authorizes the Board of Appeals, by special permit, on a case-by-case basis, to allow:

- more than one (or two) Amateur Radio Tower(s) on a lot (§ 3.8.3.6.a),
- an Amateur Radio Tower height greater than 100' (§ 3.8.3.6.c),
- an Amateur Radio Tower or Towers in the front yard of the lot provided that an alternate location on the lot is not feasible (§ 3.8.3.6.d), and/or
- a setback of less than 30 feet from side and/or rear lot lines (§ 3.8.3.6.e).

Article 25B specifically empowers the Board to grant a special permit:

- where such relief is demonstrated by the applicant to be necessary to reasonably and effectively accommodate amateur radio communications by the federally licensed amateur radio owner/operator of the Amateur Radio Tower(s),
- where such relief would not pose a substantial health, safety, or aesthetic problem to the neighborhood in the vicinity of the Amateur Radio Tower(s), and
- where denial of such special permit relief would otherwise result in a demonstrated violation of applicable Federal Communications Commission (FCC) regulations and/or Massachusetts General Law Ch. 40A, s. 3.

3. Consistency with State and Federal Law

Consistent with G.L. c. 40A, § 3, Article 25B thus:

- reasonably regulates the location and height of such antenna structures for the purposes of health, safety and aesthetics;
- reasonably allows for sufficient height of such antenna structures so as to effectively accommodate amateur radio communications, and
- through a combination of liberal by right provisions and even more liberal special permit provisions constitutes the minimum practicable regulation necessary to accomplish the legitimate purposes of the town.

Consistent with FCC Regulations, 47 CFR 97.15, Article 25B regulates placement, screening, and height of antennas based on health, safety, and aesthetic considerations, in a manner crafted to:

- accommodate reasonably amateur communications, and
- represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.

4. Ancillary Provisions

Article 25B contains three other ancillary provisions that deserve mention:

- Section 3.8.3.6.b is a removal requirement. It provides that, "The operator of the Tower(s) or the owner of the LOT shall dismantle and remove the Tower(s) within one year after the cessation of the FCC-licensed operator's ownership or tenancy, or the expiration or rescission of the operator's FCC license" (emphasis added). Recognizing that the AG has previously disapproved removal requirements tied to cessation of use (e.g. Andover Bylaw partial disapproval of 8/20/01), the Acton removal provision is not tied to the cessation of use but is tied to the cessation of the FCC-licensed operator's ownership or tenancy, or the expiration or rescission of the operator's FCC license itself. Since it is the FCC license that triggers the federal and state protections in the first instance, a one year period to remove a tower after the FCC licensed operator has moved from the property or the license has expired or been revoked is a reasonable zoning requirement.
- Section 3.8.3.6.g provides, "No portion of any Tower shall be utilized as a sign or have signage attached to it." This is a reasonable aesthetic provision. The FCC License protects the licensed amateur radio operator's right to send and receive radio signals. It does not provide a license to use the tower as an outdoor advertising device. If as Mr. Whitley contends he wants to post "Warning" signs, he is free to do so either on the protective fence around the tower or elsewhere on his property.
- Section 3.8.3.6.h provides, "No portion of any Tower shall be illuminated or have lights attached to it unless required by the Federal Aviation Administration." This is also a reasonable aesthetic provision which respects the requirements of federal law requiring tower lighting in certain circumstances.

- **Procedural Validity**

Finally, Mr. Whitley challenges the procedures pursuant to which Article 25B was adopted. Those procedures are outlined above and involved the following elements under G.L. c. 40A, § 5, all of which were satisfied in this case:

1. A zoning change initiated by the board of selectmen and the planning board;
2. A timely planning board public hearing at which interested persons were given an opportunity to be heard;
3. Published notice of the time and place of the public hearing, and of the subject matter, sufficient for identification, by interested persons;
4. Posted notice in a conspicuous place in the town hall leading up to the public hearing;
5. A report with recommendations by the planning board submitted to the town meeting in the Warrant (recommending Article 25A), and orally at Town Meeting (explaining the need for amendments on the subject and ultimately favorably recommending Article 25B after the defeat of Article 25A);¹
6. Passage by a two-thirds vote of a town meeting; and
7. Submission to the attorney general for approval as required by G.L. c. 40, § 32.

Mr. Whitley's protestations to the contrary, there was no defect in the procedure for adoption of Article 25B. Perfecting amendments to a publicly noticed zoning proposal do not require a new public hearing. *Town of Burlington v. Dunn*, 318 Mass. 216, 218 (1945); *Doliner v. Town Clerk of Millis*, 343 Mass. 10, 13 (1961). By including both Article 25A and 25B on the warrant, the Warrant appropriately stated "the time and place of holding the meeting and the subjects to be acted upon" under G.L. c. 39, § 10. *Dunn*. at 219. The persons present at the town meeting had "ample knowledge of the position and advice of the planning board," particularly given the report and recommendations of the Planning Board in the Warrant, the "explanations given by the [planning board] at the [town] meeting," and the ultimate "recommendation by the board to the town meeting that the by-law [Article 25B] be adopted." *Doliner* at 13.

¹ In any event, twenty-one days had elapsed after the Planning Board's 2/22/05 hearing before Town Meeting took up the articles on 4/5/05.

Robert W. Ritchie, Esquire

April 22, 2005

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Accordingly, the Town respectfully requests that your office promptly approve Article 25B.

Sincerely,

Stephen D. Anderson

SDA:lb

cc: Don P. Johnson, Town Manager
Sandra R. Giordano, Paralegal
Ms. Karen Whitley

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